No. 89-1984

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a Court of Appeals should treat an appeal from an order granting a motion for transfer of venue under 28 U.S.C., §1404(a) as a petition for writ of mandamus where all U.S. Courts of Appeals that have addressed the issue have held that it is within a Court of Appeals' discretion whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus.

Whether an order granting a motion for transfer of venue under 28 U.S.C., §1404(a) for the convenience of the parties and witnesses and in the interest of justice is appealable where such order is neither final, nor appealable, nor a "collateral order" as defined in *Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 98 L.Ed. 1528 (1949).

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company and Sudler and Co., now known as Sudler Marling, Inc. are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

John Hancock International Services (Hong Kong) Ltd.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

AHP Acquisition Corp.

British American Life & General Insurance Berhad

K&N Kenanga SDN, Bhd.

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, John Hancock Mutual Life Insurance Company and Sudler and Company, now known as Sudler Marling, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Court of Appeals for the Seventh Circuit's three orders in this case. The Court of Appeals' orders: (1) dismissed the Petitioners' appeal from an order of the U.S. District Court, Northern District of Illinois, Western Division, transferring Petitioners' cause of action to the Eastern Division; (2) dismissed the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, denying certification of an interlocutory appeal pursuant to 28 U.S.C., §1292(b); and (3) denied Petitioners' motion for reconsideration of the two previous orders.

OPINIONS BELOW

The Court of Appeals issued two orders on December 14, 1989. The first order dismissed the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, dated October 2, 1989, transferring venue of Petitioners' cause of action from the Western Division to the Eastern Division of the Northern District (Petitioners' Appendix A, 1-2). The Court of Appeals held that the District Court's order transferring venue was not appealable as of right. The order further stated that a petition for writ of mandamus is the appropriate avenue for reviewing an order denying or granting a motion for transfer before final judgment is entered.

The Court of Appeals' second December 14, 1989 order dismissed for lack of jurisdiction the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, dated October 26, 1989, denying certification of an interlocutory appeal pursuant to 28 U.S.C., §1292(b) from the Western Division's order transferring venue to the Eastern Division (Petitioners' Appendix B, 3-4).

The Court of Appeals' third order, dated January 16, 1990, denied the Petitioners' motion to reconsider both of the Court of Appeals' two December 14, 1989 orders (Petitioners' Appendix C, 5-6). In its January 16, 1990 order, the Court of Appeals again noted that the Petitioners may still file a petition for writ of mandamus.

Petitioners never filed a petition for writ of mandamus with the Court of Appeals.

The order of the U.S. District Court for the Northern District of Illinois, Western Division, dated October 2, 1989, transferred Petitioners' cause of action to the Eastern Division of the U.S. District Court for the Northern District of Illinois (Petitioners' Appendix D, 7-16). The U.S. District Court for the Northern District of Illinois, Western Division's order dated October 26, 1989 denied Petitioners' motion for certification of an interlocutory appeal, denied Petitioners' motion for a stay pending appeal and denied Petitioners' oral motion to stay transfer of the court file to the Eastern Division (Petitioners' Appendix E, 17-19).

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The orders of the Court of Appeals were entered on December 14, 1989. Rehearing was denied on January 16, 1990, and the Petitioners' Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C., §1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

28 U.S.C., §1404(a). Change of Venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

Petitioners Frank and Joan Whitmer purchased a condominium on the 85th floor of the John Hancock Center, located in downtown Chicago, Illinois, on August 30, 1977. Petitioners filed this federal suit in the U.S. District Court, Northern District of Illinois, Western Division (Rockford, Illinois) on June 10, 1987. Petitioners filed a First Amended Complaint on February 3, 1988. The First Amended Complaint consists of 65 pages and requests damages and equitable relief for illnesses which the Petitioners claim were caused by air pollutants. The First Amended Complaint attempts to allege claims based on federal jurisdiction under the U.S. Constitution and the Bill of Rights, RICO (18 U.S.C., §1961, *et seq.*), and 42 U.S.C., §1983, *et seq.*, as well as state claims under

pendent jurisdiction for civil conspiracy, fraud, fraudulent concealment, claims under the Illinois Consumer Fraud and Deceptive Practices Act (*Ill. Rev. Stat.* ch. 121½, §261 *et seq.*), negligence, implied warranty, nuisance, trespass, intentional infliction of emotional distress and injunction against 17 named defendants and DOES 1-50.

Prior to the filing of this federal suit, on August 31, 1982 Petitioner Frank Whitmer filed a separate lawsuit in the Circuit Court of Cook County, Illinois, against Respondents regarding his alleged medical problems. The Circuit Court of Cook County is located in downtown Chicago, Illinois. Petitioner Frank Whitmer voluntarily dismissed this state court action on June 10, 1986, exactly one year prior to the filing of the present federal suit in Rockford.

Also prior to the filing of the present federal suit, Petitioner Joan Whitmer intervened in a lawsuit filed by the City of Chicago against Respondents on July 22, 1983 in the Circuit Court of Cook County. Petitioner Joan Whitmer has been active in appearing in downtown Chicago as a *pro se* intervenor in the City of Chicago lawsuit, both in the Circuit Court and for various appeals before the Illinois Appellate Court, First District.

On October 26, 1989, Judge Stanley Roszkowski of the Western Division of the U.S. District Court, Northern District of Illinois, adopted the holding and reasoning of the U.S. Magistrate, granted all Respondents' motions brought under 28 U.S.C., §1404(a) and transferred this federal suit to the Eastern Division, located in Chicago.

On June 26, 1990, Judge Nicholas Bua of the Eastern Division dismissed this suit for want of prosecution when the Petitioners did not appear for a scheduled status before the court. As of the date of filing of this Response

to Petition for Writ of Certiorari, Judge Nicholas Bua's June 26, 1990 order of dismissal is still in effect, possibly causing Petitioners' Petition for Writ of Certiorari to become moot.

B. Issues Presented By Petitioners Which Are Not Before This Honorable Court.

Petitioners' "Questions Presented" section of their Petition for Writ of Certiorari lists ten questions, only two of which, Question #4 and Question #7, are arguably before this Honorable Court. The only issues arising from the U.S. Court of Appeals for the Seventh Circuit's orders are: (1) whether the Seventh Circuit is required to treat Petitioners' Notice of Appeal as a Petition for Writ of Mandamus; and (2) the unappealability of the order transferring venue. It is unclear to Respondents why Petitioners have filed the present Petition for Writ of Certiorari instead of filing a proper Petition for Writ of Mandamus with the Court of Appeals.

The other "Questions Presented" by the Petitioners are not addressed in the Court of Appeals' orders and, therefore, are not before this Honorable Court. In addition, Petitioners' "Question Presented" #6 is unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioners argue many points, only two of which are before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issues before this Court, whether the Court of Appeals should have treated the Petitioners' appeal from the order transferring venue as a petition for writ of mandamus and the unappealability of the order transferring venue, do not present issues which involve a conflict in the decisions of the U.S. Courts of Appeals.

I. There Is No Conflict Among The U.S. Courts of Appeals On The Question Of Whether A Notice Of Appeal From An Unappealable Order Should Be Treated As A Petition For Writ Of Mandamus. All U.S. Courts of Appeals That Have Addressed The Issue Are Uniform In Holding That It Is Within A Court Of Appeals' Discretion Whether The Notice Of Appeal Should Be Treated As A Petition For Writ Of Mandamus.

A review of the decisions of the U.S. Courts of Appeals which have addressed the issue, the Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, shows that all have held it is within a Court of Appeals' discretion whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus.

Since there is no conflict among the Courts of Appeals on this issue, therefore, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. Therefore, this Honorable Court should deny the Petitioners' Petition for Writ of Certiorari.

28 U.S.C., §1651(a) provides in part that this Honorable Court and all courts established by Act of Congress "may" issue all writs necessary or appropriate in aid of their respective jurisdictions. The particular U.S. Courts of Appeals and their holdings on this issue are set forth below:

Second Circuit: *Corcoran v. Ardra Insurance Co., Ltd.*, 842 F.2d 31, 35 (2d Cir. 1988) (except where there is a public interest involved, normal practice is to decline to treat improvident appeals as petitions for mandamus). *See also Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 944 (2d Cir. 1983).

Third Circuit: *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 (3rd Cir. 1984) (Court has the discretion to treat an improper claim to an appeal as of right as petition for mandamus); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 736 (3rd Cir. 1983) (A court "may" treat an attempted appeal of a stay order as a petition for mandamus).

Fourth Circuit: *International Nickel Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 585 (4th Cir. 1953) (Court of Appeals may treat an attempted appeal as an application for mandamus or at least give leave to the appellant to make application for the writ); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (Court of Appeals "may" treat an appeal as a petition for writ of mandamus). In the instant case, the Court of Appeals for the Seventh Circuit gave the Petitioners, the Whitmers, leave to make an application for the writ. See Court of Appeals order dated January 16, 1990, Petitioners' Appendix C, 6.

Fifth Circuit: *Huckeby v. Frozen Food Express*, 555 F.2d 542, 549 (5th Cir. 1977) (Court of Appeals possesses

the "discretionary" power to treat an attempted appeal as a petition for mandamus); *United States v. Briggs*, 514 F.2d 794, 808 and n.27 (5th Cir. 1975) (Court of Appeals "may" consider matter as a petition for writ of mandamus); *Southern Pacific Transportation Company v. San Antonio Texas*, 748 F.2d 266, 270 (5th Cir. 1984) (Court has discretion to treat mere appeal as petition for writ of mandamus).

Sixth Circuit: *Hammons v. Teamsters, Chauffeurs, etc., Loc. No. 20*, 754 F.2d 177, 179 (6th Cir. 1985) (Under extraordinary circumstances, mandamus "may" be used to review an unappealable interlocutory order); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120-121 (6th Cir. 1990) (An appeal "may" be treated as a petition and mandamus is a "discretionary" remedy).

Seventh Circuit: *United States v. City of Chicago*, 870 F.2d 1256, 1259 (7th Cir. 1989) (Court of Appeals "could" construe a request in an appeal brief as a petition for mandamus); *Geaney v. Carlson*, 776 F.2d 140, 142-143 (7th Cir. 1985) (Case did not present the "exceptional circumstances" required to warrant the issuance of a writ of mandamus).

Eighth Circuit: *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953, n.3 (8th Cir. 1979) (Emphasized that it will not treat a notice of appeal as a petition for writ of mandamus as a matter of course in every case where questions about appellate jurisdiction are raised. An appeal from an unappealable order "may" be considered as a petition for writ of mandamus where circumstances justify such treatment). *See also Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1188, n.11 (8th Cir. 1984).

Ninth Circuit: *National Organization for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir.

1987) (Court of Appeals "may", where appropriate, treat appeals as petitions for mandamus); *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964) (Where a party attempts to appeal from an unappealable order, and the circumstances justify doing so, the Court of Appeals can, in its discretion, treat the proceedings as a petition under the All Writs Act, 28 U.S.C., §1651); *Young Properties Corp. v. United Equity Corp.*, 534 F.2d 847, 854 (9th Cir. 1976) (Motion to Transfer Venue denied and Court of Appeals though "empowered" to treat the appeal from the denial as a petition for writ of mandamus declines because there was no clear abuse of discretion).

Eleventh Circuit: *Suarez-Valdez v. Shearson Lehman/ American Express*, 858 F.2d 648, 649 (11th Cir. 1988) (Court of Appeals "may" treat an interlocutory appeal as a petition for writ of mandamus).

II. An Order Granting A Motion For Transfer Of Venue Under 28 U.S.C. §1404(a) For The Convenience Of The Parties And Witnesses And In The Interest Of Justice Is Neither Final, Nor Appealable, Nor A "Collateral Order" As Defined In The *Cohen v. Beneficial Finance Loan Corp.* Case.

The U.S. Courts of Appeals are in agreement that orders granting or denying a motion for transfer of venue under 28 U.S.C., §1404(a) for the convenience of the parties and witnesses and in the interest of justice are neither final, nor appealable, nor a "collateral order" as defined in *Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

See: Kotlicky v. United States Fidelity and Guarantee Co., 817 F.2d 6, 7, n.1 (2d Cir. 1987) (transfer orders under 28 U.S.C., §1404(a) are interlocutory and not appealable); *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 765

(2d Cir. 1968) (order transferring an action pursuant to Section 1404(a) is not appealable and not a collateral order under the *Cohen* doctrine); *McCreary Tire and Rubber Co. v. Ceat S.P.A.*, 501 F.2d 1032, 1034 (3d Cir. 1974) (order transferring an action pursuant to Section 1404(a) or refusing to make such a transfer is interlocutory and unappealable); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 764, 772 (3d Cir. 1984) (orders granting or denying motions to transfer under Section 1404(a) are not appealable and are not immediately appealable as collaterally final orders under the *Cohen* doctrine); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (denial of a motion to transfer under Section 1404(a) is not an appealable order); *Ellicott Machine Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 (4th Cir. 1974) (decision of a district judge on a motion for change of venue under Section 1404(a) is not appealable as a final judgment); *Stelly v. Employers National Insurance Co.*, 431 F.2d 1251, 1253 (5th Cir. 1970) (order transferring a case under Section 1404(a) is interlocutory and not final); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (order granting or denying a requested transfer under Section 1404(a) is interlocutory and not appealable); *In re Dalton*, 733 F.2d 710, 714-715 (10th Cir. 1984) (an order transferring venue of an action is an interlocutory order and unappealable and does not constitute an appealable order as part of the *Cohen* collateral order exception); *Dobard v. Johnson*, 749 F.2d 1503, 1507 (11th Cir. 1985) (transfer orders based on *forum non conveniens* determinations brought pursuant to Section 1404(a) are non-reviewable interlocutory orders).

The Petitioners' citation, at page 24 of their Petition, to *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988), is inapposite. In the *Sterling* case the Purchase Agreement between the parties

contained a mandatory forum selection clause. Furthermore, in *Nascone v. Spudnuts, Inc.*, *supra*, 735 F.2d at 764, 772, the Court of Appeals held that an order transferring venue pursuant to a forum selection clause was not final or appealable as a matter of right or as a collateral order under the *Cohen* case.

CONCLUSION

The only issues before this Honorable Court, whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus and the unappealability of an order transferring venue, are plainly without merit. There is no conflict among the U.S. Courts of Appeals.

Furthermore, the Petitioners' Petition suggests that the remedy of a petition for writ of mandamus should be a substitute for an appeal. This is contrary to the holdings of this Honorable Court. This Honorable Court has repeatedly held that the remedy of mandamus may not be used as a mere substitute for appeal. *Will v. United States*, 389 U.S. 90, 97, 88 S.Ct. 269, 274, 19 L.Ed. 2d 305 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953); *Ex parte Fahey*, 332 U.S. 258, 260, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947).

This Honorable Court has also held that the remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances, and has traditionally been used in the federal courts only to confine an inferior court to

a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976). The Courts of Appeals' opinions from the Circuits cited above and the Seventh Circuit's action in the instant case are in conformance with this Honorable Court's holding in the *Kerr* case.

The issues raised by the Petition are plainly without merit. The Petition should be denied forthwith.

Respectfully submitted,

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Dated: July, 1990